Canter's Fairfax Restaurant, Inc. *and* Hotel Employees and Restaurant Employees Union, Local 11, AFL–CIO. Cases 31–CA–18378, 31–CA–18468, 31–CA–18526, 31–CA–18582, 31–CA–18602, 31–CA–18701, 31–CA–18802, 31–CA–18939, 31–CA–19113, 31–CA–19152, and 31–CA–19195

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 14, 1992, following issuance of the consolidated complaint but prior to the scheduled unfair labor practice hearing in the above cases, the Respondent and the General Counsel entered into a formal settlement stipulation, subject to the Board's approval, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States court of appeals. The parties to the settlement waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act and the Board's Rules and Regulations, and Respondent waived all defenses to the entry of judgment or to receive further notice of the application therefor.

Thereafter, on September 29, 1992, the Charging Party Union filed a statement in support of objections to stipulation with the Board. The Union's statement incorporated the objections the Union had previously made to the Regional Director and the General Counsel regarding the settlement stipulation, and raised an additional reason one of its prior objections to the settlement should be sustained. In essence, the Union's objections to the settlement are as follows:

(1) The stipulated order fails to contain broad cease-and-desist language. The Union asserts that such language is warranted given the pervasiveness of Respondent's violations.

(2) The order provides for only the ''minimal'' 60-day posting period. Given the number of the Respondent's violations (52 over a 2-year period), the Union asserts that a 1-year posting period as in *J. P. Stevens & Co.*, 247 NLRB 420 (1980), is warranted.

(3) The settlement contains a nonadmission clause.

(4) The settlement's reservations clause fails to clearly preserve the General Counsel's right to proceed on all other pending unfair labor practice charges not specifically covered by the settlement.

(5) The settlement fails to include a provision dismissing the decertification petition that was filed on October 12, 1990 (Case 31–RD–1218). The Union asserts that the petition was clearly tainted by the Respondent's actions; that unlike in *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), the case cited by the Regional Director, there is evidence in the instant case that Respondent assisted in the initiation of the petition and the gathering of signatures; that the Union filed a charge in April 1991 alleging such Employer involvement; and that, although the Regional Director subsequently dismissed the charge, he did so not on its merits, but because the charge was barred by the 10(b) limitations period. The Union asserts that evidence of Respondent's involvement is contained in the Region's files.

Finally, the Union requests, and contends that it has a right to, an evidentiary hearing on its objections to the settlement, citing *Food & Commercial Workers Local 23 v. NLRB*, 788 F.2d 178 (3d Cir. 1986), revd. on other grounds 484 U.S. 112 (1987).

For the reasons set forth below, we overrule the Union's objections to the settlement, deny its request for an evidentiary hearing on its objections, and approve the settlement.

No broad cease-and-desist language. The stipulated order *does* contain broad cease-and-desist language. Whether this was added after the Union's initial objection to the Regional Director or the General Counsel is unclear; but in any event such language clearly is included in the executed settlement that was forwarded to the Board for approval, and has therefore also been included in the consent order set forth below. See paragraph 1(aa).

No extraordinary 1-year posting period. The 60-day posting period provided in the settlement is the traditional posting period required by the Board. Further, the *J. P. Stevens* case is distinguishable. Although the two cases are similar in that both involve numerous alleged 8(a)(1) and (5) violations over a several-year period, unlike here, there were also a number of 8(a)(3) violations in *J. P. Stevens*. In any event, even assuming arguendo that *J. P. Stevens* is not distinguishable on that basis, this is a settlement rather than a final adjudication on the merits as in *J. P. Stevens*. Thus, although *J. P. Stevens* may be relevant, it is not controlling.

Inclusion of nonadmission clause. As indicated in the General Counsel's letter to the Union, inclusion of a nonadmission clause is not inappropriate where, as here, the settlement provides for a consent court judgment. Further, the Board in the past has consistently approved formal settlements containing such a clause where the settlement would otherwise effectuate the policies of the Act.

Ambiguous reservations clause. The settlement's reservations clause states as follows:

> This stipulation is intended to settle cases set forth in paragraph 1 above only, and does not affect any pending cases, or cases hereafter filed, including Cases 31–CA–19385, 31–CA–19407, and 31–CA–19409. Further, it is understood that the General Counsel reserves the right to use any

> evidence developed during the investigation and prosecution of the cases set forth in paragraph 1 for any relevant purpose in subsequent proceedings.

As indicated in the General Counsel's letter, the foregoing provision clearly indicates that *any* pending ULP charges not set forth in paragraph 1 of the settlement are preserved for litigation. Although it is true that the first sentence only specifically cites three cases, the sentence as a whole clearly indicates that all other cases are also preserved. There is no ambiguity.

No provision dismissing decertification petition. As indicated in the General Counsel's letter, the General Counsel determined that it would effectuate the Act to accept a nonadmission formal settlement in the unfair labor practice proceeding notwithstanding the absence of a provision dismissing the decertification petition in the representation proceeding inasmuch as there was no allegation in the complaint that the Respondent had initiated or aided the petition, and the complaint's 8(a)(1) and (5) allegations, while numerous, occurred over a 2-year period ending January 3, 1992, and appeared to be of a kind that could be remedied by a cease-and-desist order and posting of a notice. This determination is within the General Counsel's remedial discretion. See *Nu-Aimco*, supra. Although the Union argues that it did in fact file a charge alleging unlawful employer assistance to the petition, as the Union acknowledges that charge was dismissed as untimely under Section 10(b), and the Board is without statutory authority to review that dismissal.

Moreover, the mere fact that the instant unfair labor practice settlement does not provide for dismissal of the decertification petition does not necessarily mean that the petition will not ultimately be dismissed. Nothing in the instant settlement precludes the Regional Director from hereafter conducting an investigation in the representation case of the petition's showing of interest, or from dismissing the petition should that investigation reveal that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort.[1] The Regional Director retains the authority to do so, subject of course to a request for Board review under Section 102.71 of the Board's Rules and Regulations.

Finally, we note that nothing in the settlement record indicates whether the decertification petitioner would have been willing to join in a settlement which dismissed the petition. As the Board recently held in *Jefferson Hotel*, 309 NLRB No. 103 (Nov. 30, 1992), absent such agreement by the decertification petitioner, any settlement provision that provided for the petition's dismissal would be without effect.

Right to hearing on objections. The Third Circuit's view as expressed in *Food & Commercial Workers* and prior cases that a charging party is automatically entitled to a hearing on its objections to a postcomplaint formal settlement is not followed by the Board and is contrary to the holdings in other circuits, including both the Ninth Circuit (where the instant case arose) and the D.C. Circuit. See, e.g., *NLRB v. Electrical Workers IBEW Local 357*, 445 F.2d 1015 (9th Cir. 1971) (adopting Fifth Circuit view that a charging party need only be provided a hearing on any material issues of disputed fact presented by its objections); and *Textile Workers v. NLRB*, 294 F.2d 738 (D.C. Cir. 1961), order enforced after remand 315 F.2d 41 (D.C. Cir. 1963) (holding that regard must be had to the particular circumstances). See also *Ladies' Garment Workers Local 415–475 v. NLRB*, 501 F.2d 823 (D.C. Cir. 1974).

Here, the Union does not specifically contend that the first four of its objections raise any disputed issues of material fact, nor do those objections appear to do so on their face. As for the Union's fifth objection regarding the settlement's failure to provide for dismissal of the allegedly tainted decertification petition, we find the Union's objection misplaced. Even assuming that there are disputed issues of fact with respect to that objection, we find that a hearing on such an objection is unwarranted. As indicated above, a Regional Director has discretion regarding whether to fully litigate unfair labor practice cases or to seek a settlement. In the former instance, the litigation may result in a finding of unfair labor practices sufficient to ''taint'' the decertification petition and require its dismissal. But absent such a finding—or admission of such unfair labor practices by the Respondent Employer—the petition should be processed unless the petitioner voluntarily agrees to dismissal of the petition as part of the settlement. That is because the Board does not require that the petitioner be bound to a settlement by others that has the effect of waiving the petitioner's right under the Act to have the petition processed. See *Jefferson Hotel*, supra. This does not, however, extinguish the Regional Director's authority in the representation proceeding itself to investigate the showing of interest, or to dismiss the petition if the investigation reveals that the showing of interest was tainted by the Employer's direct involvement in the decertification effort. Id., and footnote 1, supra. In these circumstances, and given that the Board would not afford the Union a hearing in the representation proceeding itself on its al-

[1] See *Nu-Aimco*, supra. The Board's historical policy has been that a Regional Director may only dismiss a petition as tainted on the basis of his or her administrative investigation of the petition's showing of interest where that investigation has revealed *direct* employer involvement with the petition, e.g., supervisors circulating the petition, or supervisors threatening individual employees with discharge if they failed to sign the petition. In this regard, we note that, as indicated above, the Union's unfair labor practice charge alleging unlawful assistance in initiating the petition and gathering signatures was dismissed as untimely, rather than on the merits.

legations of employer assistance to the petition,[2] we find that a hearing in the instant proceeding on its similar objection to the settlement is unwarranted.

The settlement here fully remedies the allegations of the complaint, provides for the entry of a consent court judgment enforceable through contempt proceedings, and has been recommended for approval by the General Counsel. In these circumstances, for the reasons set forth above we find that it would effectuate the purposes and policies of the Act to approve the settlement.

Accordingly, the settlement stipulation is approved and made a part of the record and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the settlement stipulation.

On the basis of the settlement stipulation and on the entire record, the Board makes the following

FINDINGS OF FACT

The Respondent is a California corporation engaged in the restaurant business operating a facility located at 419 Fairfax Avenue, Los Angeles, California. The Respondent, during the 12-month period preceding execution of the settlement stipulation, its operations during the period being representative of its operations at all times material, derived gross revenues in excess of $500,000 and, during the same period of time, purchased and received goods and products valued in excess of $5000 which were purchased directly from suppliers located outside the State of California. The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Labor Organization Involved

Hotel Employees and Restaurant Employees Union, Local 11, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

ORDER

On the basis of the above findings of fact, the settlement stipulation, and on the entire record, the National Labor Relations Board orders that the Respondent, Canter's Fairfax Restaurant, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Hotel Employees and Restaurant Employees Union, Local 11, AFL–CIO as the exclusive representative of its employees in the unit described below (the unit):

> INCLUDED: All cooks, dining room employees, bartenders and miscellaneous kitchen employees employed by Respondent at the facility located at 419 Fairfax Avenue, Los Angeles, California.
>
> EXCLUDED: All bakery employees, office clerical employees, guards and supervisors as defined in the Act.

by:

(1) Refusing to discuss with the Union the suspensions of unit employees.

(2) Refusing to discuss with the Union discharges of unit employees.

(3) Notifying the Union that it refuses to process and arbitrate grievances.

(4) Failing and refusing to furnish the Union with information requested by the Union regarding the home addresses and telephone numbers of unit employees and the names of employees who had been tardy or had check mistakes during the previous 2 years, and the disciplinary action taken against these employees.

(5) Bypassing the Union and dealing directly with unit employees regarding health benefits or regarding any other term or condition of employment.

(b) Conditioning employment or reemployment or reinstatement of employees on their waiver of their right to engage in a lawful strike or other protected concerted activities.

(c) Interfering with employees' union activity by interrupting their conversations with members of the public during union demonstrations.

(d) Discriminatorily promulgating or applying a rule prohibiting unit employees from speaking to customers in a manner critical of the Respondent concerning the Respondent's labor dispute with the Union.

(e) Threatening to, or placing under citizen's arrest without justification, union representatives in the presence of employees.

(f) Telling employees the Respondent would never sign a contract with the Union.

(g) Falsely accusing a union representative of being a thief, and of having been fired for stealing, in the presence of employees.

(h) Falsely accusing union representatives of making anti-Semitic remarks in the presence of employees.

(i) Threatening to have a union representative arrested, in front of customers and employees.

(j) Threatening a union representative with physical harm in front of employees.

(k) Implicitly or explicitly threatening picketing employees with physical harm.

(l) Making grossly vulgar, obscene, or racist comments or gestures to picketing employees and/or to union representatives in the presence of employees.

[2] See *Union Mfg. Co.*, 123 NLRB 1633 (1959). The Union here does not specifically contend that the decertification petitioner was a supervisor. Cf. *Modern Hard Chrome Service Co.*, 124 NLRB 1235 (1959) (*Union Mfg.* rule does not apply where issue is the petitioner's supervisory status).

(m) Threatening or impliedly threatening picketing employees with discharge.

(n) Falsely accusing picketing employees of making anti-Semitic remarks.

(o) Creating the impression that employees' union activities are under surveillance by making a list of employees who participate in any union demonstration.

(p) Interrogating employees about whether they wanted the Respondent to transmit their telephone numbers to the Union.

(q) Falsely accusing a union representative of being on drugs in the presence of employees.

(r) Assaulting union representatives in the presence of employees.

(s) Videotaping or appearing to videotape employees engaged in protected concerted activities without legitimate need or without explaining to employees any legitimate need to engage in such conduct.

(t) Threatening picketing employees with arrest.

(u) Attempting to prevent employees from participating in a union demonstration by verbally promulgating a rule prohibiting employees from going outside the facility during their breaktime, and/or by selectively and disparately maintaining and enforcing the rule by permitting employees not participating in union demonstrations to go outside the facility during their breaktime, while at the same time denying such privilege to employees who participated in union demonstrations.

(v) Promising to pay an employee money if he stopped wearing a union button and engaging in union demonstrations.

(w) Threatening employees with loss of employment if they engaged in a union strike.

(x) Interrogating employees as to who was leading the employees in their union support.

(y) Telling employees that there would no longer be a Union at the Respondent's business.

(z) Disparaging employees who participate in protected concerted activity.

(aa) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees regarding health benefits and other terms and conditions of employment of the employees.

(b) On request, discuss with the Union suspensions and discharges of unit employees, and process grievances concerning unit employees pursuant to the applicable grievance procedure and arbitrate grievances arising after expiration of its collective-bargaining agreement with the Union to the extent required by *Litton Business Systems v. NLRB*, 111 S.Ct. 2215 (1991), or as it might specifically agree with the Union to do so.

(c) On request, timely provide the Union with information which is relevant and necessary to its function as the exclusive collective-bargaining representative of the unit employees; including the home addresses and telephone numbers of unit employees and the names of the employees who had been tardy or had check mistakes during the past 2 years and the disciplinary action taken against these employees.

(d) Expunge from its records concerning Jose Flores, Rodolfo Garcia, Eduardo Maldonado, Crispin Vasquez, and Efren Vasquez all references to the statement: ''I will not walk out again during my shift,'' which it required each to sign on or about September 16, 1990, and inform each of the above (except Efren Vasquez, now deceased) in writing that this has been done, and take no action inconsistent therewith.

(e) Post at its Los Angeles, California facility copies of the attached notice marked ''Appendix,'' in both English and Spanish.[3] Copies of the notice, on forms provided by the Acting Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Acting Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Pursuant to a stipulation providing for a Board Order and a consent judgment of any appropriate United States court of appeals, we notify our employees as follows:

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees in the exercise of these rights.

WE WILL NOT refuse to bargain collectively with Hotel Employees and Restaurant Employees Union, Local 11, AFL–CIO as the exclusive collective-bargaining representative of employees in the unit described below by:

(1) Refusing to discuss with the Union the suspensions of unit employees.

(2) Refusing to discuss with the Union discharges of unit employees.

(3) Telling the Union that we will not process or arbitrate any grievances of unit employees.

(4) Failing and refusing to furnish the Union with information requested by the Union regarding the home addresses and telephone numbers of unit employees and the names of employees who had been tardy or had check mistakes during the previous 2 years, and the disciplinary action taken against them.

(5) Bypassing the Union and dealing directly with unit employees regarding health benefits or regarding any other term or condition of employment.

The unit is:

> Included: All cooks, dining room employees, bartenders and miscellaneous kitchen employees employed by Respondent at the facility.
>
> Excluded: All bakery employees, office clerical employees, guards and supervisors as defined by the Act.

WE WILL NOT condition employment or reemployment or reinstatement of employees on their waiver of their right to engage in a lawful strike or other protected concerted activities.

WE WILL NOT interfere with employees' union activity by interrupting their conversations with members of the public during union demonstrations.

WE WILL NOT videotape or appear to videotape employees engaged in protected concerted activities without legitimate need or without explaining to employees any legitimate need to engage in such conduct.

WE WILL NOT threaten picketing employees with arrest.

WE WILL NOT attempt to prevent employees from participating in a union demonstration by verbally promulgating a rule prohibiting employees from going outside the facility during their breaktime, and/or by selectively and disparately maintaining and enforcing the rule by permitting employees not participating in union demonstrations to go outside the facility during their breaktime, while at the same time denying such privilege to employees who participate in union demonstrations.

WE WILL NOT promise to pay an employee money if he stops wearing a union button and engaging in union demonstrations.

WE WILL NOT threaten employees with loss of employment if they engage in a union strike.

WE WILL NOT interrogate employees as to which employees are leading the union support.

WE WILL NOT tell employees that there will no longer be a union at our business.

WE WILL NOT disparage employees who participate in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL NOT discriminatorily promulgate or enforce rules which prohibit our unit employees from discussing our labor dispute with the Union with customers.

WE WILL NOT threaten to, or place under citizen's arrest without justification, union representatives in the presence of employees.

WE WILL NOT tell employees that we would never sign a contract with the Union.

WE WILL NOT falsely accuse a union representative of being a thief, and of having been fired for stealing, in the presence of employees.

WE WILL NOT falsely accuse union representatives of making anti-Semitic remarks in the presence of employees.

WE WILL NOT threaten to have a union representative arrested, in the presence of customers and employees.

WE WILL NOT threaten a union representative with physical harm in the presence of employees.

WE WILL NOT implicitly or explicitly threaten picketing employees with physical harm.

WE WILL NOT make grossly vulgar, obscene, or racist comments or gestures to picketing employees and/or to union representatives in the presence of employees.

WE WILL NOT threaten or impliedly threaten picketing employees with discharge.

WE WILL NOT falsely accuse picketing employees of making anti-Semitic remarks.

WE WILL NOT create the impression that employees' union activities are under surveillance by making a list of employees who participate in union demonstrations.

WE WILL NOT interrogate employees about whether they want us to transmit their telephone numbers to the Union.

WE WILL NOT falsely accuse a union representative of being on drugs in the presence of employees.

WE WILL NOT assault union representatives in the presence of employees.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees regarding health benefits and other terms and conditions of employment of the employees.

WE WILL, on request, discuss with the Union suspensions and discharges of unit employees, and process grievances concerning unit employees pursuant to the applicable grievance procedure and arbitrate grievances arising after expiration of our collective-bargaining agreement with the Union to the extent required by *Litton Business Systems v. NLRB*, 111 S.Ct. 2215 (1991), or as we might specifically agree with the Union to do so.

WE WILL, on request, timely provide the Union with information which is relevant and necessary to its function as the exclusive collective-bargaining representative of unit employees including the home addresses and telephone numbers of unit employees and the names of the employees who had been tardy or had check mistakes during the past 2 years and the disciplinary action taken against these employees.

WE WILL expunge from our records and our personnel files concerning Jose Flores, Rodolfo Garcia, Eduardo Maldonado, Crispin Vasquez, and Efren Vasquez all references to the statement: ''I will not walk out again during my shift,'' which we required each to sign on or about September 16, 1990, and inform each of the above (except Efren Vasquez, now deceased) in writing that this has been done, and take no action inconsistent therewith.

CANTER'S FAIRFAX RESTAURANT, INC.